# STATE OF MICHIGAN

# COURT OF APPEALS

In re Estate of DOLORES C. SOLTYS.

DENNIS SOLTYS, SR., and MARLENE HARRIS,

Plaintiffs-Appellees,

v

DAVID A. SCHMIDLIN, Personal Representative of the Estate of KATHLEEN SCHMIDLIN,

Defendant-Appellant.

UNPUBLISHED
January 7, 2014

No. 311143
St. Clair Probate Court
LC No. 2009-000587-CZ

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment for plaintiffs following a bench trial. We affirm.

As noted by defendant, many of the pertinent facts in this case are not in dispute. Leo and Dolores Soltys had three children, Kathleen, Marlene, and Dennis. The parents put Kathleen, defendant's decedent, on their various accounts starting around 1992, and she remained a joint account-holder with Dolores after Leo's death in 2004. When Dolores died in 2007, Kathleen claimed the accounts to the exclusion of plaintiffs and added her husband, defendant. In addition, in 2006 and 2007, Dolores had signed over certain real estate to Kathleen and Marlene only, with rights of survivorship. Plaintiffs filed the instant lawsuit to obtain assets from Dolores's estate.[1]

A lengthy bench trial took place, and the trial court issued a detailed opinion consisting of 24 single-spaced pages of findings. The court found that Leo and Dolores had intended their accounts "to be shared equally between their children." It found that "[e]stablishment of the joint accounts was done for the convenience of Leo and Dolores, and was not intended by either

[1] Kathleen died during the lawsuit.

of them to constitute a conveyance of those accounts to Kathleen." The trial court ordered defendant to pay each plaintiff 1/3 of Dolores's joint accounts. The court also found that Marlene only owned the real estate, but it stated that "[d]efendant is not entitled to reimbursement for any of the expenses it incurred for the upkeep or maintenance of the real property." On appeal, defendant takes issue with these findings and also requests an award of attorney fees and costs.

As noted by plaintiffs, we review a trial court's factual findings in a bench trial for clear error. *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990). "[I]f the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse." *Id*. "[T]he burden is on the appellant to persuade the reviewing court that a mistake has been committed . . . ." *Id*. at 804. We must give regard to "the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

Defendant cites MCL 487.703, which provides that, in the absence of fraud or undue influence, a joint account shall be prima facie evidence that the depositor intended to "vest title to such deposit and the additions thereto in such survivor or survivors." The trial court found that plaintiffs had sufficiently rebutted the presumption established by MCL 487.703 and wrote 17 separate paragraphs—labeled "a" through "q"—in support of its decision that the accounts were to be shared equally among the children. Defendant takes issue with each paragraph.

In paragraph a, the court stated that "[m]any of the accounts were established by Leo and Dolores prior to his death, an apparent reflection of his desire to avoid probate administration of his estate." Defendant admits that Leo and Dolores did not want their estates probated but states that "[t]his fact is no evidence showing Dolores's intent [regarding distribution of the accounts] . . . [p]utting Kathleen on the Joint[] accounts would, in fact, avoid probate and proves nothing more." Defendant's argument is disingenuous. That taking such a step (putting Kathleen on the joint accounts) would avoid probate buttresses the trial court's conclusion that the step was taken for convenience and not to show an intent to convey the accounts solely to Kathleen.

In paragraph b, the trial court stated that "Dennis and Marlene both testified their parents always told them that all of the children would be treated equally." Defendant states that this finding is clearly erroneous because the pertinent testimony was actually that the parents told the children that they "are all equal." Once again, defendant's argument is disingenuous. The trial court's finding was a reasonable inference from the actual testimony. See, e.g., *People v Petrella*, 424 Mich 221, 275; 380 NW2d 11 (1985) ("the trier of fact may draw reasonable inferences from the facts of record").

In paragraph c, the trial court stated that "Kathleen testified that both Leo and Dolores had expressed a desire for her to receive a greater share than her siblings," but the court went on to find that the *detailed* testimony regarding Leo's and Delores's *actual* statements was much less definitive. The trial court found that Leo had expressed gratitude for Kathleen's help and Dolores had stated that she was acting, in general, according to her own free will, but neither specifically stated that they wanted Kathleen to solely inherit the accounts. The trial court's finding was supported by the evidence, and defendant provides no basis for concluding that the finding was clearly erroneous.

In paragraph d, the trial court found that "[a]t the time the accounts were established, there was no disruption in the relationships between Leo and Dolores and any of their children. All testimony relating to the alleged disruptions in the relationship regarded the time period of Leo's final illness and following his death." Defendant contends that this finding was clearly erroneous because multiple accounts were opened, with Kathleen added, after Leo's death. Defendant is correct that various accounts were opened after Leo's death. However, this does not change the fact that *when the decision to add Kathleen as a joint account-holder was first made*, there was no disharmony in the family. We find no clear error with regard to paragraph d.

In paragraph e, the trial court stated, "According to [Dolores's attorney Pam] Fons, Delores [sic] told her in their initial meeting the joint accounts 'were taken care of,' and never discussed with Ms. Fons how they would be distributed." We agree with defendant that this paragraph really does not show anything with regard to Dolores's intent concerning the accounts.

In paragraph f, the trial court stated that, on December 18, 2005, "as part of detailing the assets in her estate, Dolores noted the existence of the [a]ccounts, but did not directly provide for their distribution. She did in that memorandum and other subsequent notes, however, provide for cash payments to Dennis, to equalize the distribution." The trial court stated that the payments "would necessarily had to have been taken out of the accounts" and that "[s]uch instructions would be inconsistent with an understanding that the accounts belonged to Kathleen." We cannot find clear error in this finding because the trial court is correct that any such cash payments would have to come out of the accounts. If the accounts were to belong solely to Kathleen after Dolores's death, then it should have been up to *Kathleen* regarding what to do with them.

In paragraph g, the trial court stated, "According to Ms. Fons, Dolores never discussed with her the ownership of the joint accounts. While Ms. Fons opined that Dolores must have known how joint accounts worked, as she had been the recipient of joint accounts from her husband, she had never confirmed that opinion by discussing with Dolores the ownership of the accounts." Defendant contends that this finding was clearly erroneous because Fons testified that Dolores "knew that the survivor takes" and testified that she (Fons) "explained what would happen with the joint titling . . . ." We agree with defendant that the trial court's finding in this paragraph was clearly erroneous. A review of Fons's testimony reveals that she unambiguously testified that Dolores knew "how joint accounts worked" and the trial court's somewhat contrary implication is not supported by the record.

In paragraph h, the trial court wrote: "Dolores's statements to [Ronald] Jurczak in the Spring of 2006 were that 'all three kids would have an equal share.'" Defendant contends that this statement was erroneous because Jurczak, a cousin of the children, was testifying about Leo's estate and not Dolores's estate. However, when asked, "did [Dolores] express to you what either *she* or Leo had intentions for with respect to their children?" Jurczak answered, "She just stated to me that it was supposed to be set up equally for all three kids to have an equal share." Jurczak further testified that, although it was not stated directly, he gleaned from the conversation that Dolores agreed with Leo's decision that all children should get an equal share.

Defendant contends, however, that Jurczak's testimony was inadmissible hearsay. The trial court concluded that it would admit the testimony under MRE 803(3), which states that the

following is admissible: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . . ." Defendant argues that under *In re Cullmann Estate*, 169 Mich App 778; 426 NW2d 811 (1988), Jurczak's testimony was not admissible under MRE 803(3). We agree. Indeed, *Cullmann* is directly on point and provides that statements regarding the disposition of a joint account made *after* the account is created are not admissible under MRE 803(3). See *Cullmann*, 169 Mich App at 787-789.

In paragraph i, the trial court cited an August 3, 2006, document in which Dolores wrote that she had her "assets joint ownership with Kathleen, I trust Kathleen because I trust her. It was Dads [sic] wishes that everything be joint not to go to Probate Court." The trial court stated:

> If Dolores intended to award the joint assets to Kathleen, there would have been no reason to "trust Kathleen." This statement clearly reflects an agreement between Dolores and Kathleen which is different than that provided for by the fact of joint ownership of the account.

The trial court's finding was a *reasonable inference* from the document in question. In other words, the document provides evidence that the joint accounts were established *in order to avoid probate* and not to award the assets solely to Kathleen.

In paragraph j, the trial court stated that "Kathleen was dishonest about her financial dealings with her parents" and "refused to disclose the terms of the substantial gift she has received" and "refused to provide any meaningful information about the identity of the joint accounts . . . ." In response, defendant cites certain summary documents pertaining to the accounts and emphasizes that plaintiff's attorney failed to issue proper subpoenas. Defendant fails to offer any rebuttal to the trial court's assertion regarding the "substantial gift" or regarding Kathleen's "dishonesty." On balance, then, we cannot find clear error with respect to this paragraph.

In paragraph k, the trial court stated:

> Although she was a signatory to deeds conveying essentially all of Dolores's real estate to herself and Marlene, which had been left with an attorney for recording after Dolores's death, Kathleen told Marlene that she "maybe" would get half of the real estate. Disregard of this clear direction, obviously known to her and acknowledged in this litigation, demonstrates Kathleen's willingness to ignore or subvert Dolores's intent as it relates to the distribution of her assets.

Defendant contends that "[e]ven if Kathleen was willing to ignore or subvert Dolores[']s intent . . . that willingness in no way provides any evidence of what Dolores[']s intent was regarding any of her assets . . . ." Defendant's statement is disingenuous because the trial court's reference to Kathleen's implied manipulation was pertinent to the possibility that Kathleen was being disingenuous in claiming that Dolores wanted her to receive more than her siblings.

Paragraph l reads: "[Defendant's] testimony that Kathleen had told Marlene that there would be 'an equitable distribution' of Dolores's property." Defendant contends that no such

testimony exists. However, defendant was asked, "Were you ever present when your wife told Marlene Harris . . . not to worry, that she would be fair and things would be taken care of?" He answered, "I think I heard that." The trial court's finding was a fair inference from defendant's testimony. Defendant contends that "[s]uch a statement by Kathleen, even if it were made and even if it were relevant, would also only be neutral . . . ." We disagree. The statement provides support for the trial court's ruling.

In paragraph m, the trial court stated that, "[a]ccording to Kathleen's testimony, the only expenditures made from the joint accounts was to pay the expenses related to Dolores's funeral." The trial court apparently used this as evidence that Kathleen was not viewing the accounts as belonging solely to her. Defendant points to Kathleen's deposition, in which she stated that she "paid bills" from the accounts. Kathleen stated that she paid for "whatever came up." We agree with defendant that the trial court clearly erred with regard to this paragraph; Kathleen did not specify what sort of "bills" she paid from the accounts and there is no definitive evidence that she was using the accounts solely for items or issues relating to her mother.

In paragraph n, the court stated:

> While Kathleen testified her parents had not discussed the distribution of the accounts with her, the [c]ourt finds that testimony not credible. While the [c]ourt obviously did not have the opportunity to evaluate Kathleen's credibility from observing her testimony, that statement is inconsistent with other statements made by Kathleen in her testimony and her actions following Dolores's death.

Defendant states that this finding was clearly erroneous because Kathleen's credibility had no bearing whatsoever on Dolores's intent. We disagree. Kathleen's credibility was indeed in issue because she attempted to convey at her deposition that her parents told her that she "deserve[d] more than the other two"—her testimony went to the crux of the ownership of the accounts.

In paragraph o, the trial court stated: "[Defendant] testified that he believed Kathleen has not spent any money from the accounts. When asked why she had not, he testified, "'because it was Dolores's money.'" Defendant contends that the trial court's summary of defendant's testimony was inaccurate, but defendant did indeed state that the money in the accounts was not Kathleen's to spend. This paragraph does provide support, however slight, for the trial court's conclusion that Kathleen was added to the accounts only as a convenience to avoid probate and not to evidence an intention that Kathleen should own the accounts.

In paragraph p, the trial court stated:

> Kathleen, when asked whether her position was that "Neither Marlene or Dennis are entitled to any of those funds that your name was added to the accounts of your parents [sic]? Are they entitled to the funds?" answered, "Probably not." In explaining her position, Kathleen testified "Dennis has plenty," and that she could not discuss the matter with Marlene, "because Marlene wouldn't talk to me." Kathleen's reservations, as evidenced by her failure to clearly state her entitlement vis-à-vis her siblings, lead the [c]ourt to conclude Kathleen did not believe those accounts were hers.

The trial court's finding makes logical sense. Kathleen's testimony tended to evidence that Kathleen did not have a firm basis for believing that the accounts were hers alone. Defendant states that, under *Anderson v Lewis*, 342 Mich 53, 60; 68 NW2d 774 (1955), a survivor's belief concerning whether she is entitled to a joint account is irrelevant. In *Anderson*, *id*., the Court stated that the person in question "was not aware of her legal rights when she had a conversation with [certain] witnesses [and explained that she was not entitled to the account]." *Anderson* is distinguishable because in the present case, Kathleen's beliefs went to the crux of the litigation—whether Dolores intended for the accounts to be distributed equally among the siblings. That Kathleen had no firm answer for why she believed the money was hers alone tended to prove that Dolores had evidenced a desire for equal sharing among the siblings.

In paragraph q, the trial court stated: "At no point did Kathleen assert the will governed the distribution of these accounts. This is her recognition that the ownership, and directions for distribution, had been accomplished long before, by both Leo and Dolores." In the will, Dolores conveyed her property to Kathleen and Marlene and excluded Dennis. Defendant contends that "[i]t would make no sense for Kathleen or anyone else to assert a Will governs joint accounts" because MCL 487.703 governs joint accounts. We tend to agree that the legal strategy chosen by the defense—to avoid arguing the will as the basis for distribution of the accounts—should not be used as evidence to support a finding of equal distribution of the accounts.

As noted in *Allstaedt v Ochs*, 302 Mich 232, 237; 4 NW2d 530 (1942), the statutory presumption arising from the joint accounts can be rebutted by competent evidence. Even though we have found *some* of the trial court's findings to be clearly erroneous, ample evidence remains in place to support the trial court's ultimate finding concerning the joint accounts. The trial court's finding "is plausible in light of the record viewed in its entirety," and thus reversal is unwarranted. *Beason*, 435 Mich at 803.

Defendant contends that the trial court's ruling was against the great weight of the evidence because Dolores knew the effect of a joint account and because Dolores executed a will and other documents excluding Dennis from receiving property.

> When a party claims that a jury's verdict was against the great weight of the evidence, we may overturn that verdict only when it was manifestly against the clear weight of the evidence. This Court will give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. [*Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (citations and quotation marks omitted).]

We agree that there is evidence to support defendant's position, but at the same time there was "competent evidence to support" the trial court's finding. *Id*. In light of the deferential standard of review, and in light of the fact that the defense did not rely below on the will in arguing for

how the accounts should be distributed (and thus did not adequately preserve the current argument),[2] we find no basis for a new trial.

Defendant next takes issue with the trial court's failure to order reimbursement for expenses relating to Marlene's real estate. The court stated:

> While Marlene has an interest in the real estate, and should have had an interest in the real estate as of the date of Dolores's death, Kathleen and Defendant, in conjunction with their agent, Ms. Fons, denied Marlene the benefits of ownership of the real estate by failing to follow Dolores's instructions with regard to the recording of the deeds conveying an interest in the real estate to Marlene. Accordingly, Marlene had no legally enforceable obligation to pay those expenses. Additionally, a party asking the Court to do equity must come before the Court with clean hands. Ms. Fons[']s], Kathleen's and Defendant's refusal to honor Dolores's wishes gives them unclean hands, as they failed to carry out those wishes. The Court finds Defendant's argument disingenuous, at best. Initially, Defendant opposed the validity of the 1984 deeds. After Kathleen's death, Defendant asserted the 1984 deeds would be valid, and sought reimbursement for expenses. Accordingly, the Court will not intervene to compel Marlene to contribute to the expenses incurred during the time period Ms. Fons, Kathleen, and Defendant deprived Marlene of the benefits of ownership of the real property to which she was entitled.

Defendant claims that because a deed does not necessarily have to be recorded to convey an interest to the grantee, the trial court's findings were clearly erroneous. Defendant's argument is without merit. Kathleen admitted that she had changed the locks and "locked out" Marlene from some of the property (they had owned the property jointly before Kathleen's death) and defendant admitted that he was retaining the keys to this property until the "dispute as to the monies" was resolved. In addition, Fons admitted that she refrained from recording the various deeds because she was attempting to obtain expenses from Marlene. Given the defense's gamesmanship, it was not clearly erroneous for the trial court to rule that the defense had

[2] The defense did cite the will in arguing for a new trial. However, the fact remains that the defense did *not* argue that the will represented the true distribution scheme. Again, the will left assets jointly to Kathleen and Marlene, but defendant wants the accounts to be vested entirely in Kathleen. It appears that defendant is attempting to "pick and choose" aspects of the will to support the position he favors. We acknowledge that in assessing paragraph q above, we indicated that we tended to agree with defendant that the legal strategy chosen by the defense—to avoid arguing the will as the basis for distribution of the accounts—should not be used as evidence to support a finding of equal distribution of the accounts. In the present context, defendant *is* attempting to argue the will as the basis for distribution of the accounts, but in doing so he is focusing on only certain aspects of the will.

"unclean hands" and Marlene should not be required to pay for maintenance expenses concerning the real property.

Defendant next argues that the trial court should have granted his motion for partial summary disposition under MCR 2.116(C)(8) and (10), concerning the joint accounts.

> This Court reviews rulings on summary disposition motions de novo. MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. The motion must be granted if no factual development could justify the plaintiff's claim for relief.
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> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. [*Koenig v South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999) (internal quotation marks and citation omitted).]

With regard to MCR 2.116(C)(8), defendant contends that plaintiffs' complaint "contains only conclusions devoid of allegations of fact" and thus "does not suffice to state a cause of action . . . ." This is simply untrue. The complaint did indeed contain allegations of fact and the claim was indeed supported at trial. See, e.g., *Holland v Liedel*, 197 Mich App 60, 64; 494 NW2d 772 (1992). With regard to MCR 2.116(C)(10), defendant contends that the trial court's three bases for denying the motion (the will, affidavits evidencing an intent on the part of the parents to treat the children equally, and issues concerning deeds) were untenable. At a minimum, however, the affidavits served to create a genuine issue of material fact—one that was eventually established at trial. Reversal is not warranted.

Defendant contends that he is entitled to an award of attorney fees by this Court, see MCR 7.216(C)(1), because plaintiffs submitted frivolous documents—namely, the complaint, affidavits in response to the motion for summary disposition, and documents relating to the defense to the claim for reimbursement of real-estate expenses. Defendant's argument is without merit, because the claimed documents were not frivolous and in fact plaintiff prevailed at trial and on appeal.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad